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IN THE

SUPREME COURT

Filed Sept. 22, 1900.

OF THE

UNITED STATES

OCTOBER TERM, 1899.

THE OREGON RAILROAD & NAVIGATION COMPANY, *Appellant*,
v.
ROBERT BALFOUR, *et al.*, partners doing business as BALFOUR, GUTHRIE & COMPANY, *et al.* — No. 313.

THE OREGON RAILWAY & NAVIGATION COMPANY and THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, *Appellants*,
v.
ROBERT BALFOUR, *et al.*, partners doing business as BALFOUR, GUTHRIE & COMPANY, *et al.* — No. 314.

Appeal from the Circuit Court of Appeals for the Ninth Circuit.

Brief for the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company.

W. W. COTTON,
For Appellants.

A. B. BROWNE,
Of Counsel.

PORTLAND, OREGON:
F. W. BALTES AND COMPANY, PRINTERS, 228 OAK STREET.
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Brief for the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company.

All of the facts and proceedings had in this case are stated at length in the brief filed herein on behalf of the Oregon Railroad & Navigation Company, and reference

will be made herein to the facts only for the purpose of showing what questions are presented by the appeal of these appellants.

In October, 1892, the barge Columbia and the steamer Ocklahama were owned by the Oregon Railway & Navigation Company, but were leased to the Oregon Short Line & Utah Northern Railway Company for a period of ninety-nine years, and the Oregon Short Line & Utah Northern Railway Company was exclusively operating said barge and steamer. On the 19th of October, 1892, Balfour, Guthrie & Co. loaded upon the barge Columbia a cargo of wheat to be transported upon said barge from Portland, Oregon, to Astoria, Oregon. The barge was under the charge of a captain who had no connection with any boat or vessel other than the Columbia; and the captain of said barge, for and on behalf of the Oregon Shon Line & Utah Northern Railway Company, executed and delivered to Balfour, Guthrie & Co. a shipping receipt for the wheat so loaded. Afterwards, but on the same day, the Columbia was taken in tow by some boat or vessel other than the Ocklahama, and was towed from the dock at which she had been loaded to a place in the City of Portland known as the "boneyard," and there remained from the 19th of October, 1892, until the afternoon of the 21st of October. During the afternoon of the 21st of October, the Ocklahama took the Columbia in tow for the purpose of towing the Columbia from the boneyard in Portland to the dock at Astoria of the Oregon Railway & Navigation Company, then operated by the Oregon Short Line & Utah Northern Railway Company. Marshall B. Short was captain of the Ocklahama, and John August Peterson was a deckhand on the Ocklahama. While making a landing at the dock at Astoria the Columbia struck a floating pontoon, which was kept next the wharf as a fender, and the Columbia sprung a leak. The persons in

charge of the Columbia deemed it advisable to remove the barge into more shallow water, and the barge was therefore taken behind the dock, where she rested on the bottom of the Columbia river, and was listed against the dock in a safe position. Afterwards the captain of the barge, one Ferguson, caused a portion of the cargo to be shifted until the barge was on an even keel and was no longer resting against the dock. At the time the cargo was shifted the tide was ebbing, and after the barge came to an even keel she rested in that position for a short time. The tide having ebbed and the barge having no lateral support, she keeled over away from the dock, striking her bilge on the bottom of said river with great force, causing the cargo to shift and carry away her deckhouse, and a large part of the cargo slid into the river and the hull of the barge was broken down by the shock. This accident happened three hours after the barge had been placed behind the dock. (Record, p. 136.) Marshall B. Short and John August Peterson, who were in the hull of the barge, were killed. After the accident, the Oregon Railway & Navigation Company and the Orgon Short Line & Utah Northern Railway Company, as lessee, filed in the district court of the United States for the district of Oregon their petition praying for a limitation of the personal liability of the petitioners arising out of the damage done by the destruction of the Columbia. (Record, p. 1.)

No attempt was made to limit their liability as owners of the Ocklahama, and no offer to surrender the Ocklahama was made.

After the filing of the petition the district court appointed appraisers to ascertain the value of the Columbia (Record, p. 8), and these appraisers determined the value of the barge to be $100. (Record, p. 9.) On December 6, 1892, the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Com-

pany gave a bond for the appraised value of the barge (Record, p. 10); and on the 12th day of December, 1892, the district court made an order reciting the proceedings already had and decreeing that "the prosecution of all suits and proceedings against the Oregon Short Line & Utah Northern Railway Company or the Oregon Railway & Navigation Company, in respect to any claim for damages for any loss, destruction, damage or injury occasioned on the 21st and 22d days of October, 1892, or her (the barge Columbia's) loss or destruction, be and the same is hereby restrained." (Record, p. 12.)

Balfour, Guthrie & Co., the owners of the wheat lost (Record, p. 17), Malvina Short, as administratrix of the estate of Marshal B. Short (Record, p. 28), Sven Anderson, as administrator of the estate of John August Peterson (Record, p. 32), Annie C. Larson, mother of John August Peterson (Record, p. 38), and William Boyce (Record, p. 22), appeared in the proceedings and filed answers to the petition and resisted the claim of petitioners to a limitation of liability. It will be observed from a reading of the answers filed by the respondents that no relief was sought against the steamer Ocklahama by any of the respondents, but that in and by each of said answers, judgments *in personam* were prayed against the Oregon Short Line & Utah Northern Railway Company or against the Oregon Short Line & Utah Northern Railway Company and the Oregon Railway & Navigation Company.

Testimony was taken before Bellinger, district judge, (Record, pp. 103-387), and, after argument, that judge handed down a written opinion (Record, p. 86), in which the conclusion was reached that the petitioners were entitled to limit their liability to the value of the Columbia. As the result of this opinion, a decree to that effect was entered February 19, 1894. (Record, p. 84.) By that decree the petitioners were ordered to pay into court $100;

and the clerk of the court was ordered to pay one-third of this amount to Balfour, Guthrie & Co., one-third thereof to William Boyce, and one-third thereof to Malvina Short, Sven Anderson and Anna C. Larsen.

From this decree Malvina Short, as administratrix, Sven Anderson, as administrator, and Balfour, Guthrie & Co. appealed (Record, p. 91); and their appeal was allowed (Record, p. 100). The appeal was taken by Balfour, Guthrie & Co., in their firm name, without specifying the names of the persons constituting the partnership. No citation issued upon this appeal, but a notice signed by the proctors for the persons appealing, and directed to the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, and their proctor was served. No service of any citation or notice was made upon William Boyce or Anna C. Larsen, and no appeal was taken by either Boyce or Larsen.

When the appeal came on for hearing in the Circuit Court of Appeals, the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company moved the court to dismiss the appeal upon the grounds: First, the proceedings were irregular, because the appeal was taken by Balfour, Guthrie & Co. in their firm names, without naming the individuals composing the firm; and, second, because the decree was a joint decree, and Boyce and Larsen had not joined in the appeal, had not taken an appeal, and had not been barred of their right to appeal by any proceedings in the nature of summons and severance.

The motion to dismiss the appeal was heard by Mr. Justice McKenna, then circuit judge, and District Judges Hanford and Hawley, and the appeal was dismissed (Record, p. 399). The opinion of the court was delivered by Hanford, district judge, and will be found in the Record, page 388. The appellants moved for a rehearing, and this

was granted (Record, p. 391). On the rehearing an argument was had before McKenna, Gilbert and Ross, circuit judges. The motion to dismiss the appeal was overruled, and the decree of the district court reversed, and the cause remanded to the district court for further procedings (Record, p. 406). The opinion of the court was delivered by Ross, circuit judge, and will be found in the Record, page 393. Mr. Justice McKenna dissented from the conclusion of the court overruling the motion to dismiss the appeal, but concurred in the conclusion of the court as to the merits (Record, p. 406).

As stated in the opinion of the Circuit Court of Appeals (Record, p. 404), the principal reasons assigned by the respondents against allowing the Oregon Short Line & Utah Northern Railway Company and the Oregon Railway & Navigation Company to limit their liability to the value of the barge were, first, that the Columbia was, from the inception of the voyage, unseaworthy, and, second, that the Columbia and the Ocklahama were, in law, one vessel; and that in order to avail themslves of the benefit of the limited liability act the owners must surrender the Ocklahama as well as the Columbia in satisfaction of the loss and damage complained of.

Upon the question of the seaworthiness of the barge and the cause of the accident the district court in its decree (Record, p. 84), found that the barge was seaworthy and that the accident occurred solely through the negligence of Ferguson, the captain of the barge.

The district court, in the opinion delivered, (Record, p. 89), held that the Ocklahama and the Columbia were not within the meaning of the limited liability act one vessel; and having held that the Ocklahama did not in any way cause the accident, it was therfore decreed that the railway companies could limit their liability to the value of the Columbia.

All of the findings of fact made by the district court were by the Circuit Court of Appeals sustained and accepted as conclusive (Record, p. 404). The decree of the district court was reversed solely because of the fact that the Circuit Court of Appeals was of the opinion that the Ocklahama and the Columbia constituted one vessel; that both of said vessels were pledged for the faithful performance of the contract entered into by the captain of the Columbia with Balfour, Guthrie & Co. for the transportation of their wheat; and that it was immaterial whether the officers of the Columbia or of the Ocklahama made the contract of carriage or whether the negligence of the Columbia alone caused the accident (Record, pp. 404-406).

During the first trial in the district court the respondents made no attempt to seize the Ocklahama, and did not seek to have her brought into court. The amount sought to be recovered by the respondents was far in excess of the value of the Ocklahama, and, therefore, the respondents were not and could not have been satisfied with anything less than full personal liability on the part of these appellants. During the pendency of the first appeal, receivers of the property of both of the petitioners had been appointed, and suits commenced to foreclose mortgages upon the property owned by them. When the mandate was entered in the district court the petitioners were no longer able to surrender the Ocklahama and thus limit their personal liability, and the position of the respondents had also changed. The respondents no longer sought personal liability, but wished to have the Ocklahama brought into court and be subjected, without any further hearing, to the demands of the respondents to the same extent as if the proceeding had been one *in rem* against the Ocklahama. Acting upon the suggestion of the respondents, the district court on receiving the mandate of the Circuit Court of Appeals, caused seizure to be made of the Ocklahama. E. McNeill, then

receiver of the Oregon Railway & Navigation Company, appointed in a suit to foreclose a mortgage made in 1885 upon all the property of the Oregon Railway & Navigation Company, filed his petition alleging his interest and sought to have the Ocklahama returned to him (Record, p. 455). This petition was denied (Record, p. 458). The Oregon Railroad & Navigation Company afterwards purchased the Ocklahama at the foreclosure sale had under said mortgage, and after such purchase appeared and filed a petition setting up its interest in the Ocklahama, and prayed leave to defend (Record, p. 464). Afterwards the Oregon Railway & Navigation Company gave a bond for the value of the Ocklahama and undertook to defend by filing answers to the only pleadings on file which would seem to require an answer, namely, the answers of the respondents to the petition to limit liability. The answers of the Oregon Railroad & Navigation Company will be found in the Record at pages 475, 481, 488 and 495. Exceptions were filed to these answers by all of the respondents on the ground that the defenses therein contained were immaterial, impertinent and ***res judicata***. The exceptions were sustained and the Oregon Railroad & Navigation Company was not allowed to defend. On December 20, 1897, findings were made as to the damages suffered by Balfour, Guthrie & Co., Malvina Short, as administratrix, Sven Anderson, as administrator, and Anna C. Larsen and it was found that Balfour, Guthrie & Co. had suffered damages in the sum of $16,018.79; that Malvina Short, as administratrix, had suffered damages in the sum of $5,000; that Sven Anderson, as administrator, had suffered damages in the sum of $3,000, and that Anna C. Larsen had not sustained any damage. Thereupon an order was made for the distribution of the appraised value of the Ocklahama, and the Oregon Railroad & Navigation Company was required to pay into the registry of the court the sum of $86,000, the ap-

praised value of said steamer; and it was further ordered that when said sum was paid the petition to limit liability of the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company should be allowed (Record, p. 513).

From this decree the Oregon Railway & Navigation Company, the Oregon Short Line & Utah Northern Railway Company and the Oregon Railroad & Navigation Company appealed to the Circuit Court of Appeals (Record, pp. 516-562).

The appeals so taken were heard by the Circuit Court of Appeals for the ninth circuit, and the decree of the district court was, in all respects, affirmed. The opinion of the Circuit Court of Appeals will be found in the Record, p. 575.

On the 6th day of March, 1899, (Record, p. 594), the Oregon Railroad & Navigation Company filed in the Circuit of Appeals its petition for an appeal to this court, and in connection with said petition filed an assignment of errors (Record, p. 601). The Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company filed their petition for an appeal to this court, and in connection with said petition, filed their assignment of errors (Record, p. 603). Gilbert, circuit judge, on the 4th day of April, 1899, duly allowed the said appeals, as shown by the orders appearing in the Record, pages 608, 609.

In connection with their appeal the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company now make the following

ASSIGNMENT OF ERRORS.

First—The Circuit Court of Appeals erred in reversing the decree of the district court of the United States for the district of Oregon, entered on the 19th day of February,

1894, which decree was on the 26th day of February, 1894, duly modified by the order of said district court.

Second—The Circuit Court of Appeals erred in holding that the original decree of the district court for the district of Oregon, on the 19th day of February, 1894, (Record, p. 84), was not a decree jointly affecting Robert Balfour and others, doing business as Balfour, Guthrie & Co.; Malvina Short, administratrix; Sven Anderson, administrator; Anna C. Larsen and William Boyce, and erred in overruling the motion of the Oregon Railway & Navigation Company and of the Oregon Short Line & Utah Northern Railway Company to dismiss the appeal from said decree taken alone by Robert Balfour and others, doing business as Balfour, Guthrie & Co.; Malvina Short, administratrix, and Sven Anderson, administrator, and erred in hearing said appeal and reversing said decree of February 19, 1894, as the result of such hearing.

Third—The Circuit Court of Appeals in its decree made and entered on the first appeal herein erred in decreeing that these appellants the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company could not limit their liability for the damage done by the barge Columbia without surrendering the steamer Ocklahama.

Fourth—The Circuit Court of Appeals in its decree made and entered on the first appeal herein erred in decreeing that the barge Columbia and the steamer Ocklahama constituted but one vessel within the meaning of the act of congress entitled An Act to Limit the Liability of Shipowners, and for Other Purposes, approved March 3, 1871, and the various statutes in addition thereto and amendatory thereof, and in decreeing that these appellants could not limit their liability in respect to the matters and things mentioned and described in the petition filed by these appellants under said acts without surrendering the Ockla-

hama, and erred in reversing on said ground the decree of the district court of the United States for the district of Oregon made and entered in said court on the 19th day of February, 1894, and modified on the 26th day of February, 1894.

Fifth—The Circuit Court of Appeals in its decree made and entered upon the first appeal made herein erred in decreeing that the steamer Ocklahama or these appellants as the owner or lessee thereof respectively, were in any way liable to Robert Balfour and others, partners, doing business as Balfour, Guthrie & Co., or to Malvina Short, administratrix of the estate of Marshall B. Short, deceased, or to Sven Anderson, administrator of the estate of John August Peterson, deceased, or to Anna C. Larsen, by reason of any act or thing done or committed by the said Ocklahama or the persons having her in charge, and erred in reversing on said ground the decree of the district court of the United States for the district of Oregon made and entered on the 19th day of February, 1894, and modified on the 26th day of February, 1894.

Sixth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon made and entered in said district court on August 2d, 1897, and re-entered in said district court on the 20th day of December, 1897, for the reason that under the mandate of the said United States Circuit Court of Appeals entered in said district court on March 16, 1896, the said district court had no jurisidiction to enter any personal judgment or decree against these appellants or either of them, except for the costs of said proceeding.

Seventh—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon made and entered in said

court on August 2d, 1897, and re-entered on the 20th day of December, 1897, for the reason that said district court had no jurisdiction to enter any decree under the mandate of the Circuit Court of Appeals imposing any liability upon these appellants, or either of them, or upon the steamer Ocklahama.

Eighth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Orgon made and entered in said court on August 2d, 1897, and re-entered on the 20th day of December 1897, for the reason that said district court in said decree erred in ordering and decreeing the payment into court of the value of the steamer Ocklahama or the delivery to trustees of said steamer or of any interest in said steamer as a condition to the right of these appellants, or either of them, to limit its or their liability in respect to the matters and things alleged in the petition of these appellants initiating this proceeding and filed in said district court on the 29th day of November, 1892.

Ninth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon made and entered in said court on August 2d, 1897, and re-entered on the 20th day of December, 1897, for the reason that the said decree of the district court so affirmed was not in accordance with the opinion of the said United States Circuit Court of Appeals in this proceeding rendered on the first appeal and is inconsistent therewith.

Tenth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon made and entered in said court on August 2d, 1897, and re-entered on the 20th day of De-

cember, 1897, for the reason that the said district court erred in seizing the steamer Ocklahama, and in making the said decree so affirmed for the reason that said district court was without power or authority in this cause to issue process against the Ocklahama or to cause the Ocklahama to be seized.

Eleventh—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon made and entered in said court on August 2d, 1897, and re-entered on the 20th day of December, 1897, because the district court erred in seizing the Ocklahama, and in entering said decree for the reason that this proceeding was commenced by these appellants to limit their personal liability and was a suit in personam, and that the seizure of the said Ocklahama and that the decree of the district court so affirmed changed the said proceeding in personam rising out of a collision into a proceeding in rem, and such action is contrary to the admiralty rules and practice of the Supreme Court of the United States.

Twelfth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon made and entered in said court on August 2d, 1897, and re-entered on the 20th day of December, 1897, because the district court in said decree erred in decreeing that the steamer Ocklahama or her value should be surrendered in order that these appellants, and each of them, might limit its or their liability to the said Robert Balfour and others, the respondents herein, for the reason that there was no evidence showing that the towage services of the steam tug Ocklahama were not fully performed when the said barge Columbia was placed alongside the dock at Astoria, but on the contrary, the evidence

shows that the said services of the said Ocklahama were at the time of the alleged injuries to said respondents, and each of them, fully performed.

Thirteenth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon made and entered in said court on August 2d, 1897, and re-entered on the 20th day of December, 1897, because the district court erred in seizing the steamer Ocklahama in this proceeding and decreeing that the steamer Ocklahama or her value should be limited in order that these appellants, or each of them, might limit its or their liability for the damages mentioned in the petition of these appellants initiating this proceeding and filed in the district court on the 29th day of November, 1892, for the reason that these appellants have never sought to limit their liability, or the liability of either of them, for any damages caused or done by the said steamer Ocklahama.

Fourteenth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon made and entered in said court on August 2d, 1897, and re-entered on the 20th day of December, 1897, because the district court erred in seizing the Ocklahama, and erred in decreeing that the said Ocklahama or her value should be surrendered in this proceeding, for the reason that if these appellants, or either of them, were not entitled by reason of the filing of the petition initiating this proceeding and by reason of the payment into court of the appraised value of the barge Columbia, and the other matters and things done by these appellants to limit their liability, and the liability of each of them, to the said Robert Balfour and others and to the estates of Marshall B. Short and John August Peterson and Anna C.

Larsen. Then and in that event it was the duty of the said district court, under the rules and practice in such cases made and provided, to have dismissed this proceeding and to have allowed the said Robert Balfour and others and the administratrix of the said estate of Marshall B. Short, and the administrator of the estate of John August Peterson and Anna C. Larsen to have taken such remedy as they, or either of them, might have been advised against these appellants, or either of them, or else to have confined the relief granted to the said Robert Balfour and others and the said adminstratrix and administrator and the said Anna C. Larsen to personal decrees and judgments against the Oregon Railway & Navigation Company or the Oregon Short Line & Utah Northern Railway Company, or both, as the court might have been advised under the evidence and findings of fact.

Fifteenth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United Sates for the district of Oregon made and entered in said court on August 2d, 1897, and re-entered on the 20th day of December, 1897, because the district court erred in decreeing that the steamer Ocklahama should be seized or the said steamer or her value surrendered in this proceeding, for the reason that such relief so decreed is improper under the rules and practice in proceedings of this character.

Sixteenth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon made and entered in said court on August 2d, 1897, and re-entered on the 20th day of December, 1897, because the district court in decreeing that Robert Balfour and others, doing business as partners under the name of Balfour, Guthrie & Co.; Malvina Short, administratrix of the estate of Marshall B. Short, deceased,

and Sven Anderson, administrator of the estate of John August Peterson, deceased, or either of them, should have or recover any sum whatsoever against appellant the Oregon Railway & Navigation Company, for the reason that it appears from the pleadings, evidence and findings of fact made by the district court that the said appellant the Oregon Railway & Navigation Company had long prior to the date of the alleged injuries to said persons, or any of them, duly leased to the Oregon Short Line & Utah Northern Railway Company the said barge Columbia and said steamer Ocklahama, and that the same, and each of them, were exclusively and solely operated at the time of said injuries by the Oregon Short Line & Utah Northern Railway Company, and the Oregon Railway & Navigation Company had no interest of any kind whatsoever in said operation and had made no contract for the carriage of the wheat belonging to said Robert Balfour and others, and had not in its employ the said Marshall B. Short and the said John August Peterson, and was not liable to the said persons, or either of them, for any injuries received by them, or either of them.

ARGUMENT.

The Assignment of Errors raises, among others, the following points:

First—The motion to dismiss the appeal from the original decree of the district court should have been allowed.

Second—The Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company were entitled to limit their liability without a surrender of the Ocklahama.

Third—The district court had no jurisdiction to make any decree for damages against either the Oregon Railway & Navigation Company or the Oregon Short Line & Utah

Northern Railway Company, but should have simply dismissed the proceeding and dissolved the injunction.

Fourth—The Oregon Railway & Navigation Company was not liable to either of the respondents.

I.

The motion to dismiss the appeal from the original decree of the District Court should have been allowed.

This court has repeatedly held that all parties against whom a joint decree is rendered must all appeal or be barred of their right to appeal by summons and severance.

Owings v. Kincannon, 7 Peters, 399.
Masterson v. Herndon, 10 Wall. 416.
Hampton v. Rouse, 13 Wall. 187.
Simpson v. Greeley, 20 Wall. 152.
Sipperly v. Smith, 155 U. S. 86.
Inglehart v. Stansbury, 151 U. S. 70.
Hardee v. Wilson, 146 U. S. 179.

Three of the judges of the said circuit, to wit, Mr. Justice McKenna, and District Judges Hanford and Hawley, held in this case that the original decree of the district court was a joint decree within the meaning of the decisions of this court above cited, and therefore dismissed the appeal (Record, p. 388). Afterwards on a rehearing, Circuit Judges Gilbert and Ross, Mr. Justice McKenna dissenting, held that the original decree of the district court was not a joint decree, and therefore heard the appeal. (Record, p. 393.)

It is believed that the first decision of the Circuit Court of Appeals correctly applied the law.

Section 4283 of the Revised Statutes of the United States provides that, in the cases therein mentioned, the liability of the owner of any vessel for loss or damage shall not exceed the amount or value of the interest of such

owner in such vessel and her freight then pending. The act does not provide how the shipowner shall avail himself of the limitation upon his liability thus created. In commenting upon Section 4284, this court, in *Norwich Co. v. Wright*, 13 Wall. 123, says: "The act does not state what court shall be resorted to nor what proceedings shall be taken." *In Providence & N. Y. S. S. Co. v. Hill Manufacturing Co.*, 109 U. S. 590, Mr. Justice Bradley, commenting upon the case of the *Norwich Transportation Co. v. Wright*, says that as a result of the decision in the case mentioned, the court felt called upon to adopt some general rules for the better carrying out of the act to limit the liability of owners of vessels; and as a result the present rules governing the procedure were shortly afterwards announced. The object and purpose of these rules is thus stated in the opinion of the Circuit Court of Appeals dismissing the appeal in this case (Record, p. 389): "The rules promulgated by the Supreme Court above referred to make all persons having claims for damages, growing out of a marine casualty, proper parties to any proceeding to limit the liability of the owner of the vessel, so that the entire subject-matter may be fully and finally adjudicated in one proceeding. *Providence & N. Y. S. S. Co. v. Hill Manufacturing Co.*, 109 U. S. 578, 601." In the case last cited, Mr. Justice Bradley, delivering the opinion of the court, p. 594, says: "In promulgating the rules referred to, this court expressed its deliberate judgment as to the proper mode of proceeding on the part of shipowners for the purpose of having their rights under the act declared and settled by the definitive decree of a competent court, which should be binding on *all parties interested*, and protect the shipowners from being harassed by litigation in other tribunals. Unless some proceeding of this kind were adopted, which should bring *all the parties interested into one litigation, and all the claimants into con-*

course for a pro rata distribution of the common fund, it is manifest that in most cases the benefits of the act could never be realized. Cases might occur, it is true, in which the shipowners could avail themselves of those benefits, by way of defense alone, as where both ship and freight are totally lost, so that the owners are relieved from all liability whatever. But even in that case, in the absence of a remedy by which they could obtain a decree of exemption as to all claimants, they would be liable to a diversity of suits, brought perhaps in different states, after long periods of time, when the witnesses have been dispersed, and issuing in contrary results before different tribunals, whilst in the ordinary cases, when a limited liability to some extent exists, but to an amount less than the aggregate claims for damages, so as to require a concourse of claimants and a pro rata distribution, the prosecution of separate suits, if allowed to proceed, would result in a subversion of the whole object and scheme of the statute."

When the owner of the vessel adopts the procedure outlined by the 54th Admiralty Rule, the effect, as stated by Judge Bradley in the case referred to, is to make all persons having claims for damages against the owner of the vessel proper parties to the proceeding. The main question to be decided in the proceeding is whether or not the owner is entitled to limit his liability. If such question is decided in favor of the owner, a decree is entered up compelling all persons having claims for damages to seek satisfaction out of the fund created by the boat, or its value deposited in court. In such a proceeding, a decree in favor of the owner immediately creates a fund in which each of the respondents has an interest, the exact amount of the interest to be determined by the distribution afterwards to be made. As a result of such a decree, each of the respondents immediately loses his cause of action against the owner. As a result, to use the language of the Circuit

Court of Appeals in its first opinion (Record, p. 390): "In every such proceeding all the injured persons have a common interest in the main question as to the right of the owner to limit his liability, and if judgment passes in his favor as to that question, they are all entitled to share in the distribution and the common fund arising from the sale of the vessel or the payment into court of the appraised value thereof; and each person who appears and submits a claim for the court to pass upon has a right to appeal from a decision in favor of the owner." The result of such a common interest upon the right to appeal is then thus stated (Record, p. 390): "The Supreme Court has announced and reiterated several times the rule that separate appeals to the court, by several parties asserting interests in common, affected by a single decree, cannot be permitted, and has enforced the rule by dismissing appeals when necessary parties are not joined, nor barred of their right to appeal by refusing to join after due notice." In support of the principle stated by the court, the following cases are cited:

Owings v. Kincannon, 7 Peters, 399.
Masterson v. Herndon, 10 Wall. 416.
Hampton v. Rouse, 13 Wall. 187.
Simpson v. Greeley, 20 Wall. 152.

The very object of the 54th Admiralty Rule of the United States is to try out in a single case the question of the right of the owner to limit his liability. Is it not a perversion of the rule to say, in the event that the shipowner wins, that each one of the respondents has a right to prosecute, in the Appellate Court, a distinct and separate appeal? If the object of the 54th Admiralty Rule is to consolidate all the proceedings in the lower court, it has an equal application to the proceedings in the appellate court. This principle is clearly and distinctly set forth in the first opinion of the Circuit Court of Appeals (Record

p. 390), wherein, commenting upon the effect of the 54th Admiralty Rule upon the proceeding in the lower court, it is said: "For similar reasons when an appeal is taken, it is essential to the jurisdiction of the appellate court that each party having a right to be heard upon the review of the case should be brought before the court or estopped from continuing the litigation."

The object of the appeal was to reverse the decree of the district court, practically enjoining each of the respondents from commencing actions against the railway companies to recover for the damages done by reason of the accident to the barge Columbia. If separate appeals could be taken in a proceeding to limit liability, the Circuit Court of Appeals might, for example, decide against the appellant in the first appeal and afterwards, in a close case, might, by a change in the personnel of the court, decide in favor of the second appellant. Would the first appellant still be enjoined, or would the action of this court upon the second appeal relieve all of the respondents in the proceeding from the operation of the injunction?

The whole policy of this court, as indicated by all of the decisions cited, is to avoid trying any case in fragments on appeal, and the object of the 54th Admiralty Rule is to enable persons situated like the railway companies to try out the entire matter in one proceeding, both in the court below and on appeal.

Upon the question as to the nature of this suit and of the original decree, the second opinion of the Circuit Court of Appeals upon the first appeal and the opinion upon the second appeal are inconsistent with each other. In the opinion first mentioned (Record, p. 401), it was held that the object of the suit was to establish the personal liability of the railway companies towards each of the respondents.

Upon the second appeal, however, the Circuit Court of Appeals held that the object of the suit was not to estab-

lish personal liability against these appellants and that the proceeding from the first had been "a suit in equity in admiralty, not to subject property to liens nor to obtain a personal decree against owners of property." (Record, p. 578.) The court therefore held that the proceeding should not terminate in personal decrees against the railway company, but that the fund (the Ocklahama), in which all the respondents had a common interest, should be brought into court. It was further held that neither Balfour, Guthrie & Co. nor these appellants could object to the allowance made to Anderson and Short because no appeal had been taken by any person as to that portion of the original decree of the district court establishing liability in favor of Anderson and Short. (Record, p. 580.) Does not the opinion of the Circuit Court of Appeals upon the second appeal show clearly that the first appeal was an appeal from a decree to the effect that these appellants might by the surrender of the Columbia limit their liability not only as against Balfour, Guthrie & Co., Anderson and Short, but as against the whole world; and that the appeal was taken solely for the purpose of reversing such a decree jointly affecting all of the present respondents?

Our view of the nature of these proceedings and of the original decree rendered by the district court may possibly be made plainer by an illustration. Assume that William Boyce, who commenced his action against these appellants in the state court of Oregon (Record, p. 3), had not appeared in the proceedings to limit liability instituted by these appellants. As a result of the issuance of the order (Record, p. 12), Boyce was temporarily enjoined from proceeding in his suit in the state court. As a result of the original decree of the district court limiting liability, Boyce was, so long as that decree stood, permanently enjoined. An appeal is taken by Balfour, Guthrie & Co., Anderson and Short, and the first decree is reversed. These

appellants do not surrender the Ocklahama and the district court is unable to seize her. Under these circumstances would Boyce have been enjoined from further prosecuting his action in the state court? Was Boyce not at all times interested in the proceedings to limit liability, although not a party thereto; was he not interested in common with Balfour, Guthrie & Co. in preventing liability from being limited; was he not bound by the decree entered against Balfour, Guthrie & Co. and affected thereby to the same extent and in the same way as those respondents; was he not benefited by the success attending their appeal? In the present case, Anna C. Larson was a party to the original decree of the district court and never appealed therefrom. When that original decree was reversed Mrs. Larson by her counsel went on with the litigation just as though she had appealed and was properly regarded by the district court as not being bound by this original decree. What reversed that original decree as to Larson? If anything it must have been the appeal taken not by her but by the other respondents from the decree affecting the rights of all of the respondents in the same way and to the same extent.

In the opinion of the Circuit Court of Appeals upon the first appeal (Record, pp. 401, 403), reference is made to Oliver v. Alexander, 6 Peck, 143, and to Thomas v. Lane, 2 Sumner, 6. The first case related to the joinder in admiralty of distinct causes of action on the part of seamen to recover wages, and the second case related to the joinder in salvage cases. The very quotations made by the Circuit Court of Appeals from the opinions in the cases mentioned show that the original decree of the district court in the present case was a joint decree from which a joint appeal should have been taken. The following quotation is made from Oliver v. Alexander (Record, p. 402):

"But, although the libel is thus in form joint, the con-

tract is always treated in the admiralty, according to the truth of the case, as a several and distinct contract with each seaman. Each is to stand or fall by the merits of his own claim, and is unaffected by those of his colibelants. The defense which is good against one seaman may be wholly inapplicable to another. One may have been paid, another may not have performed the service, and another may have forfeited, in whole or in part, his claim to wages. But no decree whatsoever which is made in regard to such claim can possibly avail to the prejudice of the merits of others which do not fall within the same predicament; and wherever, from the nature of the defense, it is inapplicable to the whole crew, the answer invariably contains separate averments and is applied to each claim according to its own peculiar circumstances."

In a proceeding to limit liability each respondent so far as the limitation of liability is concerned does not stand or fall by himself; but the owner of the vessel is either entitled to limit as to all or is not entitled to limit as to any; and the final decree, as in the present case, is a decree which enjoins all of the respondents or else leaves them free to proceed as they may be advised.

The very object of the proceeding to limit liability is to bring all of the parties injured into one suit and decide once and for all the question whether or not the owner of the vessel is entitled to limit liability.

The Circuit Court of Appeals (Record, p. 403), quotes the following from Thomas v. Lane: "In case of an appeal from a joint decree in chancery against the defendants in the suit all of the defendants affected by the decree must join, but this is because they are united in interest."

A proceeding to limit liability is an equitable proceeding for the purpose of obtaining an injunction restraining all persons from commencing actions against the owner of the vessel.

In re Morrison, 147 U. S. 34.

The Circuit Court of Appeals in its second opinion (Record, p. 578), states that the proceeding is a suit in equity for the purpose of adjusting all claims, and that as a result of the institution of the proceedings all suits were stayed and every person enjoined. The appellants sought an injunction against the whole world and obtained it by the original decree of the district court. Whether such injunction was properly obtained depended solely upon whether the accident had happened without the knowledge or privity of the appellants and whether the appellants had surrendered the proper fund. If the injury happend without the knowledge or privity of the owner the injunction is granted. If the contrary fact be found the injunction is refused. All of the persons injured are affected by the decree limiting liability and are bound by the proceedings even though not parties thereto. The decree entered is a decree against or in favor of all the persons injured, and each injured person, although his injury be separate and distinct from that of the others, is affected by the decree in common with every other injured person. All persons injured have an interest in the same question and all are bound by the same decree. Read in this connection the statement of fact in the case of Inglehart v. Stansbury, 151 U. S. 68, and note that while each of the parties thereto held a portion of the land in controversy in a different way and neither was interested in the success of the other, yet that nevertheless the decree was held to be a joint decree for the reason that all of the parties were interested in the same question. The same statement may be made in regard to the facts in the case of Sipperley v. Smith, 155 U. S. 86. So in the present case all of the respondents had a common interest in the question as to whether or not the appellants were entitled to limit their personal liability, all

alike were bound by the original decree and all should have appealed therefrom.

II.

The Oregon Railway & Navigation Company and the Oregon Short Line and Utah Northern Railway were entitled to limit their personal liability without a surrender of the Ocklahama.

Section 4283 of the Revised Statutes, limiting the liability of shipowners, reads as follows:

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing lost, damage or forfeiture done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

This section is clearly and positively to the effect that the liability of the owner of any vessel for the destruction by any person of any property shipped or put on board of such vessel, without the knowledge or privity of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending. The wheat of Balfour, Guthrie & Co. was placed on board of the barge Columbia and a contract of affreightment was entered into by the master of the barge Columbia on behalf of the said barge, for the transportation of such wheat. (Allegations of the libel, Record, p. 5, not denied by the answers; opinion of Circuit Court of Appeals, Record, p. 404.) The goods were not shipped on board of the Ocklahama, and there was no contract of affreightment of any kind whatsoever made with or on behalf of the Ocklahama. This proceeding

was commenced for the purpose of limiting the liability of the Oregon Railroad & Navigation Company, and of the Oregon Short Line & Utah Northern Railway Company, as the owner and lessee of the barge Columbia, for the loss and destruction of the goods shipped on board of the said barge and for no other purpose.

As stated in the opinion of the Circuit Court of Appeals (Record, p. 404), the principal reasons assigned by the respondents against allowing the Oregon Short Line & Utah Northern Railway Company and the Oregon Railway & Navigation Company to limit their liability to the value of the barge, were, first, that the Columbia was, from the inception of the voyage, unseaworthy; and, second, that the Columbia and the tug were, in law, one vessel; and that, in order to avail themselves of the benefit of the limited liability act, the owners must surrender the Ocklahama as well as the Columbia in satisfaction of the loss and damage complained of. Upon the question of the seaworthiness of the barge and the cause of the accident, the district court in its decree made the following findings of fact (Record, p. 84):

"First—That on October 21, 1892, the barge Columbia, being loaded with 8,808 sacks of wheat on her deck, owned by the respondents, Balfour, Guthrie & Co., was taken in tow by the steamer Ocklahama at Portland, Oregon, and by her towed to Astoria, Oregon, said barge and steamer being owned by the petitioners herein.

"Second—That said barge and steamer arrived in safety at Astoria during the night of said October 21, but that in making a landing the stem of said barge struck a floating pontoon, which was kept next the wharf as a fender, with such force as to cause said barge to spring a leak. That said leak was not considered serious or dangerous by those in charge of the said barge, and was not serious or dangerous.

"Third—That said barge, about half an hour after striking said pontoon, was moved to a position behind said wharf, where she rested on the bottom of the Columbia river, which was there composed of soft mud, and being listed against the dock was in a safe position.

"Fourth—That Marshall Short, master of said Ocklahama, and Gus Peterson, one of the crew of said Ocklahama, thereupon descended into the hold of said barge for the purpose of building a bulkhead to stop said leak, and at the same time John Ferguson, master of said barge, was assisting in pumping the water out of said barge by means of a siphon, the lower end of which rested in the bottom of said barge on the side away from the dock.

"Fifth—That after the said barge had rested in this position against the dock *for about an hour and a half*, and while said Short and Peterson were in the hold of said barge, said John Ferguson on his own motion negligently caused the cargo on the deck of said barge to be shifted until said barge was on an even keel and was no longer resting against the dock. At this time, and for some time prior thereto, the tide in the Columbia river was ebbing.

"Sixth—That when said barge came to an even keel she remained in that position for a short time, when, the tide having ebbed and she having no lateral support, said barge keeled over away from said dock, striking her bilge on the bottom of said river with great force, causing the cargo to shift and carry away the deckhouse, and a large portion of said cargo slid into said river, and the hull of said barge was broken down by the shock.

"Seventh—That said Short and Peterson were unable to escape from the hold of said barge, and were drowned, and said William Boyce, who was in the hold of said barge, was injured by being struck by said cargo in attempting to reach the deck of said barge.

"Eighth—That said barge was seaworthy, and was at

the time of the voyage in a suitable and proper condition for the purpose for which she was being used; that she was properly manned and was not overloaded, *and that the said leak caused by striking the dock was not serious or dangerous; that the position in which she was placed against the side of the dock was a proper and safe position, and that the accident was caused by the negligent shifting of the cargo on said barge by the said Ferguson* and the collapse was due to the exceptional strain to which the timbers were subjected in the unnatural position in which she was placed when thrown upon her side, and that the steamer Ocklahama did not in any way cause the said accident.

"Ninth—That John Ferguson, the master of the said barge, was a licensed mate upon the Columbia river, and there was no negligence on the part of the petitioners or either of them in employing the said John Ferguson; that the said John Ferguson occupied no position with either of the petitioners herein except that of captain of the said barge; that the said accident resulting in the death of Short and Peterson and injuries to Boyce and the loss of the wheat loaded on the said barge occurred without the knowledge or privity of said petitioners or either of them."

The district court, in the opinion delivered (Record, p. 89), held that the Ocklahama and the Columbia were not within the meaning of the limited liability act one vessel, and, having held, as stated in the eighth finding of fact contained in the decree, that the Ocklahama did not, in any way, cause the accident, it was therefore decreed that the railway companies could limit their liability to the value of the Columbia.

All of the findings of fact made by the district court were sustained by the Circuit Court of Appeals, and were accepted by the Circuit Court of Appeals as conclusive (Record, p. 404), and the decree of the district court was

reversed solely because the Circuit Court of Appeals was of the opinion that the Ocklahama and the Columbia constituted, for the purposes of the voyage, one vessel; that both of said vessels were pledged for the faithful performance of the contract entered into by the officers of the Columbia with Balfour, Guthrie & Co. for the transportation of their wheat; that it was immaterial whether the officers of the Columbia or of the Ocklahama made the contract of carriage, or whether the negligence of the captain of the Columbia alone caused the accident, and that no limitation of liability could be obtained without the surrender of both the Columbia and Ocklahama. In the opinion of the Circuit Court of Appeals (Record, pp. 404-406), it is said:

"All of the respondents and cross-libellants not only contended that the barge was, from the inception of the voyage, unseaworthy, but also, that the barge and tug were, in law, one vessel, and that, to avail themselves of the benefit of the limited liability act, the owners must surrender the tug as well as the barge in satisfaction of the loss and damage complained of. The court below found the fact to be that the barge was, at the time of the accident, seaworthy, and, as the evidence in respect to that question is decidedly conflicting, the finding of the trial court must be accepted on this appeal as conclusive. The Alejandro, 6 C. C. A., 54; 56 Fed. 621. The court below also found that the master of the barge was negligent in shifting certain portions of her cargo, and that this negligence of the master of the barge was the proximate cause of the sinking of the barge, and of the loss and injuries sustained by the respective claimants, and, holding, as it did, that 'the tow service of the tug was ended before the proximate cause of the accident was set in motion,' confined the compensation of the respective claimants to the stipulated value of the barge. In this we think the court below was in error.

"The case shows that the wheat in question was destined to be transported from Portland, Oregon, to Liverpool, England, by means of the barge Columbia and the British ship Westgate. That fact appears, not only from the testimony in the case, but from the petition as well. The Oregon Short Line & Utah Northern Railway Company, lessee of the barge and of the tug Ocklahama, undertook to transport the wheat from Portland to the ship Westgate. The shipping receipt issued by the master of the barge to the owner of the wheat was issued on behalf of the owner of the craft. The contract of carriage was the owner's contract, and the terms of the contract were that the carrier was only to be liable to the owner of the cargo for negligence. According to the contract, the carrier was liable for negligence. As the wheat was to be carried on board the barge, which had no motive power, of necessity such power had to be supplied by the carrier. This the carrier did, as was its custom, by means of a tug—in this instance the tug Ocklahama, owned by the Oregon Railway & Navigation Company, and under lease to the Oregon Short Line & Utah Northern Railway Company, as was the barge Columbia. When the tug made fast and took in tow the barge, to perform the contract of carriage, the two became one vessel for the purpose of that voyage—as much so as if she had been taken bodily on board the tug, instead of being made fast thereto by means of lines. The Northern Belle, 9 Wall. 526-29; Sturgis v. Boyer, 24 How. 10-122; The Merrimac, 2 Sawy. 595, Fed. Cas. No. 9,478; The Bordentown, 40 Fed. 686. . . .

"In the present case, the barge and tug had the same owner, and both were operated by the same carrier. In the voyage both were necessarily under the control of the master of the tug. They constituted the instrument of carriage, to which the wheat was liable for the service, and on which the owners of the cargo had a lien for the due

performance of the contract of carriage. The case shows that the tug, having the barge loaded with wheat in tow, left Portland about 1 o'clock in the afternoon of October 21, 1892, and reached Astoria about 12 o'clock that night. Notwithstanding there is nothing in the case to show that the contract of carriage contemplated the landing of the wheat at Astoria, or the tying up of the barge at the dock at that place, but, on the contrary, the delivery of the wheat from the barge to the ship Westgate, yet the tug—due, probably, to the late hour of arrival—undertook to tie up at the dock, and, in doing so, carelessly ran the barge against the piles of the dock, and with such force as to knock a hole in her stem, thereby causing a serious leak. The master of the tug continued, after the accident, to exercise control over the barge, as well as the tug, changed its position, put the engineer of the tug at work with a siphon to pump the water out of the barge, and himself went, with one of the deckhands of the tug, into the hold of the barge for the purpose of building a bulkhead to guard against the water, and was so engaged when, about two hours after the accident, the barge collapsed, causing the death of the master and deckhand of the tug, the injury of Boyce, the deckhand of the barge, and the loss of the wheat to Balfour, Guthrie & Co.

"The court below held that the collapsing of the barge was occasioned by the negligent shifting of some sacks of wheat by the master of the barge, and that that act of his was the proximate cause of the loss and damage in question. But no question of proximate cause, we think, arises in the case, for the reason that the tug and barge are, in law, considered one vessel, for the purpose of the voyage in question, and whether the accident giving rise to the loss and damage be directly attributable to the acts of the master of the barge or to those of the master of the tug, it is equally the negligence of the carrier, for which it contracted to be liable. It results that, in according the peti-

tioners a limitation of liability without the surrender of the tug Ocklahama, the court below was in error."

Upon this branch of the case is raised the question as to what constitutes the "vessel" to be surrendered mentioned in the limited liability act; and also the question whether a tug is subject to a lien arising out of the contract of affreightment made by her tow in a case where the fault was committed by those in charge of the tow, and the tug was without fault. Upon these questions the position taken by the Circuit Court of Appeals is not sound as a matter of law. The two vessels are separate and distinct. Each has its owner, its general creditors and its lienors. Each may be separately sold to a *bona fide* purchaser. Each is subject to separate and distinct liens arising as a result of maritime contracts made on behalf of the vessel or of maritime torts committed by it. Maritime liens cannot be extended by construction, analogy or inference. This principle and the nature of a maritime lien is clearly stated in the case of *Vandewater v. Mills*, 19 How. 89, as follows:

"The maritime 'privilege,' or lien, is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a '*jus in re*,' without actual possession or any right of possession. It accompanies the property into the hands of a *bona fide* purchaser. It can be executed and divested only by a proceeding *in rem*. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed proceedings *in rem*, are evidently not within the category. But this privilege or lien, though adhering to the vessel, is a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is, therefore, '*stricti juris*,' and cannot be extended by construction, analogy or inference. 'Analogy,' says Pardessus (Droit Civ., Vol. 3, p. 597), 'cannot afford a decisive argument,

because privileges are of strict right.' They are an exception to the rule by which all creditors have equal rights in the property of their debtor, and an exception should be declared and described in express words; we cannot arrive at it by reasoning from one case to another."

The law creates no lien on a vessel as a security for the performance of contract to transport a cargo until some lawful contract of affreightment is made and the cargo is shipped under it.

The Freeman v. Buckingham, 18 Howard, 388.

Vandewater v. Mills, 19 How. 89.

The Keokuk, 9 Wallace, 517.

In the present case the contract of affreightment was made by the master of the barge Columbia, and the shipping receipt was issued by said master on behalf of the barge. Such a contract of affreightment could create no lien against the Ocklahama. The Ocklahama, if negligent in towing the barge, might, as a result of such tort, become subject to a lien in favor of the barge or its cargo, but cannot be made subject to a lien in favor of the cargo of the Columbia as a result of the contract of affreightment made on behalf of the Columbia. It cannot be said that because a tugboat assists in towing a vessel, such tugboat becomes, as a result of such act, subject to a lien for the performance of all of the contracts of affreightment entered into by the vessel in respect to the freight shipped thereon.

It is undoubtedly true that it is not absolutely necessary that the merchandise received under a contract of affreightment shall actually be physically placed in the vessel.

Buckley v. Naumkaeg Company, 24 Howard, 386.

It is stated by this court in that opinion (p. 389), that the "condition of the Bay of Mobile, which is somewhat peculiar, because material to the proper understanding of the question in this case." It is then stated that vessels of large size and drawing over a given depth of water cannot pass the bar in the bay, which is situated a considerable

distance below the city, and that the cargo of such vessels is brought to them in lighters from the city over the bar and then laden on board the vessel. It is stated (p. 389) that from the agreed statement of facts it appears that the master of the vessel then lying at the Port of Mobile agreed to carry for the libellant 770 bales of cotton from that port to Boston. The custom of the port was shown in evidence, and it was held that the delivery to a lighterman as the agent of the ship was a delivery to the master of a ship, so as to render the ship liable for the performance of the contract of affreightment. It will be noted that a contract of affreightment was actually entered into on the part of the ship, and the only question involved in the case was as to what constituted a delivery. The opinion nowhere states, however, that a delivery to the lighter without a contract on the part of the ship would render the ship liable for the acts of the lighter.

Any such result is contrary to the principles stated in The Keokuk, 9 Wallace, 517. In that case it is clearly held that the law creates no maritime lien on a vessel as security for the performance of a contract to transport a cargo unless some contract of affreightment has been made, and that, under the fact, no contract was shown, and hence the Keokuk was not liable for the loss of the grain on the barge.

The Keokuk, supra, and the Northern Belle, 9 Wallace, 522, show the manner of handling grain in bulk upon the Western rivers. Barges are left at various places along the river to be loaded by the shippers with grain in bulk delivered from elevators. (9 Wall. 528.) During the time of loading, the barge is under the control of the shipper, and is simply a receptacle into which the grain may be placed. From time to time, steamboats arrive, make contracts for the carriage of the grain, and convey the grain to its destination. When contracts of affreightment are made by the steamer, then on the principle established in

the case of ***Buckley v. Naumkaeg***, 24 Howard, 386, the steamer becomes responsible for the safe delivery of the grain and becomes subject to a lien for any breach of the contract of affreightment.

In the present case, the contract of affreightment was made with the barge Columbia, and no contract of any kind whatsoever for the carriage of the goods was made for or on behalf of the Ocklahama. It is true that both boats were owned by the Oregon Railway & Navigation Company; but it is equally true that the Farmers' Loan & Trust Company had an interest in the Ocklahama, which can only be divested as the result of a maritime lien against that vessel.

This court has directly held, in the case of the J. P. Donaldson, 167 U. S. 599, 603, that a tug towing a barge is not liable as an insurer to the cargoes on board the barge, and that the owners of the barge or the cargoes could not maintain any action for the loss of either against the tug or her owners, without proving negligence on the part of the tug.

Under the decision in J. P. Donaldson, ***supra***, the Ocklahama could only be held liable as a result of a tort committed by the Ocklahama. The court below found that no such tort had been committed by the Ocklahama, and hence it follows that there is no lien against that vessel.

In the case of Sturges v. Boyer, 24 How. 110, a tug towing a ship was alone held liable for a collision to a third vessel. That result was reached for the reason that the fault causing the collision was committed by the tug alone, and the reasoning of the court on page 122 clearly shows that in cases where the tow alone was in fault the tug would not be subject to any lien.

The decision in The Bordentown, 40 Federal Reporter, 687, is clearly against the position taken by the Circuit Court of Appeals, and holds that, no matter how many

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boats owned by the same person may be engaged in the performance of the same service or contract, the owner may limit his liability by a surrender of the boat or boats at fault, and need not surrender the others. The Pennsylvania Railroad Company, the owner of three tugs, The Bordentown, The Winnie and The Willie, engaged to take a fleet of canal-boats or barges from South Amboy to the sea fence in Brooklyn. The tow left South Amboy in charge of The Winnie and The Willie. Soon after leaving South Amboy the tow was joined by The Bordentown, which boat took charge of the fleet. The Willie detached a portion of the tow and landed it safely at the Standard Oil Company's dock near Port Johnson, and The Bordentown and The Winnie proceeded with the tow. After passing the mouth of the Kills and entering the bay, the water was found to be very rough, and it was deemed unsafe to proceed to the sea fence at Brooklyn on account of the direction of the wind making that place unsafe to moor the tow. The tow then proceeded in the direction of the American docks, but after going in this direction for a time the wind shifted so as to render these docks an unsafe mooring place. The fleet was then headed in the direction of the Kills, but had not gone far in this direction when it was joined by The Willie, whose captain had come from Port Johnson after having landed his detachment of the tow at that point, to render any assistance to The Bordentown that might be needed (p. 685). The captain of The Willie reported that the water was very rough at the mouth of the Kills, and the pilot of The Bordentown determined again to cross the bay to Brooklyn. After having proceeded in this direction for a distance, the Hughes, the port hawser boat, sunk on account of filling with water, and parted the port hawser. The tow then got loose from the tugs and pounded each other in the open sea, and many of the boats were lost. The Winnie rescued one boat and The Willie two others. The railroad

company offered to surrender the three boats. It was held that the fault was committed in undertaking to cross the bay, and that as The Willie was not present at the time the first attempt was made, she need not be surrendered. It will be noted, however, that The Willie started with the tow and afterwards returned to it to render any service needed, and was at all times performing some service in connection with the tow. On the theory of the Circuit Court of Appeals, she was pledged to the performance of the work, and must therefore be surrendered. She was held, however, not to be a party to the fault, and, therefore, need not be surrendered. This decision clearly shows that the negligent vessel, or vessels, alone, need be surrendered, and not all of the vessels owned by a common master engaged in the same service.

Furthermore, no offer has been made in the present case to surrender the Ocklahama. The object of the petition was to limit the liability of the owners of the Columbia for the loss and damage inflicted by her. If the Ocklahama committed any wrong, the appellants have a lien upon that boat, and can proceed against her, if they be so advised. All the vessels engaged in the common fault need not be surrendered in order to limit the liability of the owners of any particular boat engaged in the fault. This is clear from the language of Section 4283 of the Revised Statutes, and of the amendment of June 26, 1884 (23d Statutes at Large, 57). The individual liability of each owner is limited to the value of his interest in the boat, to be ascertained in the manner provided by the amendment. The point raised was directly presented to Judge Benedict, in re Myers Excursion & Navigation Company, 57 Fed. Rep. 240. The facts in this case will be found stated by the learned judge commencing on page 241. The barge Republic was hired under a contract to take an excursion party to Cold Spring Grove and back to New York. The barge in pursuance of that contract took on

board the excursion party and was towed to Cold Spring Grove by the steamer Crystal Stream, owned by the same persons. Early in the afternoon the barge reached a wharf on the east side of the harbor at Cold Spring, where she was made fast to the end of the wharf, the port side of the barge being next to the wharf and the Crystal Stream being fast to her on her starboard side. Just as the barge was about to leave the wharf on the return trip, the excursionists being on board but the lines not cast off, a thunder storm came up from the westward, striking the barge on her starboard side. By the force of the wind the roof on the hurricane deck on the starboard side was raised off its fastenings and doubled over against the two masts of the barge and the pilot-house. The pilot-house turned over, the two masts broke, and these masts, together with the broken portion of the hurricane deck fell upon the other side of the hurricane deck, which was thereby crushed down upon the passengers underneath it, and thirteen of the passengers were in this way killed. The owners of the barge being sued for the injuries to these passengers, filed their petition and surrendered the barge to the custody of the court. It was claimed that the petitioners were not entitled to the relief sought, for the reason that the tug Crystal Stream had not been surrendered. Judge Benedict disposes of this objection as follows (p. 241): "The next objection taken is, that the tug Crystal Stream, being the motive power of the barge Republic, should also have been surrendered. This objection is without foundation. The petitioners do not seek to limit any liability they may be under as owners of the Crystal Stream, and there is nothing in this proceeding to prevent the parties injured from proceeding against the Crystal Stream or her owners, if so advised."

III.

The district court had no jurisdiction to make any decree for damages against either the Oregon Railway & Navigation Company or the Oregon Short Line and Utah Northern Railway Company, or to seize the Ocklahama.

In view of the nature of this proceeding, the only decree which could have been entered in the district court upon the mandate of the Circuit Court of Appeals was one dissolving the injunction restraining the respondents from pursuing appropriate remedies to collect the damages claimed to have been suffered by them, and the district court had no power to retain jurisdiction of the proceeding for the purpose of entering a judgment against the railway companies, or either of them, for damages.

That this position is correct is clearly shown by the history of the limited liability act and the procedure which has grown up under it. The proper method of obtaining the limitation of liability is not pointed out by the Revised Statutes, although Section 4283 provides that it shall be deemed sufficient compliance on the part of such owner if he transfers his interest in such vessel or freight for the benefit of such claimants to a trustee to be appointed by any court of competent jurisdiction.

Under this act no special proceeding to limit liability need be instituted, but the benefit of the act may be obtained by claiming such benefit in any proceeding instituted either against the owner of the vessel or against the vessel itself.

In The Manitoba, 122 U. S. 97, the benefit of the act was claimed in a libel in rem against the vessel by filing a petition in the proceeding in rem.

In The Scotland, 105 U. S. 24, the benefit of the act was obtained by pleading it in the answer to a libel in personam against the owner of the vessel.

In Craig v. Continental Insurance Company, 141 U. S.

638, the benefit of the act was claimed in an answer filed in an action at law.

The benefit of the act need not be claimed at any particular time, but the owner of the vessel can wait until judgment has gone against him.

The Benefactor, 103 U. S. 239.

Where the right to limit liability is claimed in a suit brought by a particular claimant, the result might be that the owner of a ship would be required to pay out as the result of the aggregate amount of several judgments entered in different suits more than the value of the vessel For the purpose of preventing any such result, this court, as the result of the decision in the case of Norwich Co. v. Wright, 13 Wallace, 104, 125, prepared and announced Admiralty Rules 54 to 57 inclusive. Those rules authorize the institution of a proceeding by the owner of a vessel for the purpose of obtaining a decree against all persons injured by the vessel, restraining such persons from commencing or further prosecuting any suits against the owner to enforce personal liability. The proceeding under those rules is an equitable action, having for its purpose the obtaining of an injunction.

In re Morrison, 147 U. S. 14, 34.

In the proceeding authorized by the 54th Admiralty Rule, the petitioners seek to limit their liability and obtain the consequent injunction enjoining all persons from instituting any suit or proceeding to establish personal liability against the petitioners; and the claimants resist the right to limit, and seek to have the injunction dissolved.

The present proceeding being an equitable proceeding for the purpose of obtaining an injunction, the result is that if the railway companies had been successful the injunction should have been granted. The railway companies being unsuccessful, then the injunction granted on the commencement of the proceeding should have been dissolved and the proceeding should have been dismissed.

In re Myers Excursion & Navigation Company, 57 Fed. Rep. 240, a petition to limit liability was filed for injury done by a barge. The case was tried before Judge Benedict, and he held that the cause of the injury was within the knowledge and privity of the owner, and that therefore the owner was not entitled to limit liability. The closing words in the opinion of this distinguished admiralty judge show what the practice should be in such cases: "My decision, therefore, is that the petition should be dismissed and the injunction dissolved."

It is a familiar principle that a court of equity has no power to enter a decree for damages except as an incident to the granting of some equitable relief, and where the relief is withheld, damages cannot be granted, no matter what view the court may take of the rights of the parties.

Pomeroy's Equity, Second Edition, Sec. 178.

Buzzard v. Houston, 119 U. S. 352.

Storey's Equity Jurisprudence, Sec. 794.

Beach's Equity Jurisprudence, Sec. 3.

A court of equity has undoubted jurisdiction to entertain a suit to enjoin an action at law, and when the conclusion is reached that such injunction should be granted, the court of equity has power to hear and determine all questions of fact existing between the parties.

Pomeroy's Equity Jurisprudence, 2d Edition, Sec 236.

When the conclusion, however, is reached that there is no equity in the bill and that the injunction should be refused, the court of equity would have no right to enter such judgment as it thought should be entered in the law action between the parties. The jurisdiction is invoked for a special purpose. The decision of the court would be binding between the parties as to the right to enjoin the legal action, and such question could not again be raised or litigated; but the jurisdiction of the court to decide between the parties is limited by the purpose for

which such jurisdiction was invoked. This proposition would seem to be too plain to need argument. If it be not correct, then it would follow that the commencement of a suit in equity to enjoin a legal action would immediately transfer to the court of equity jurisdiction over the entire action, although the court should reach the conclusion that the bill was absolutely without equity and should never have been filed. The text of Mr. Pomeroy, to which reference has been made, clearly shows that it is only when the court has jurisdiction to grant the injunction that it has power to go further and decide the whole issue.

In the present case the proceeding was instituted solely for the purpose of determining between all persons interested whether or not the petitioners were entitled to limit their liability, and were therefore entitled to enjoin any and all other suits. The decision of the court upon the right of the petitioners to limit their liability and obtain an injunction is final and binding, but the court having reached the conclusion that no such judgment should be granted, it had no jurisdiction to enter a judgment, even by consent, determining the issues of liability existing between the parties.

If, however, it be considered proper that any decree for damages should be entered, such a decree must in the very nature of things be a personal decree against those seeking to limit their liability. The suit relates solely to personal liability, and is not a suit in rem.

In re Morrison, 147 U. S. 34.

Such a suit ought not to terminate in a decree in rem against a vessel.

At the time the petition initiating this proceeding was filed, the Ocklahama was not surrendered, and no attempt was made by either of the railway companies to limit their liability for any damage done by the Ocklahama. On the contrary, it was constantly claimed that no damage was done by the Ocklahama. If the petitioners did not wish

to limit their liability, if any, arising out of any injuries done by the Ocklahama, the courts below had no power to seize the Ocklahama for the purpose of making the railway companies limit their personal liability. The right to limit liability is one conferred upon owners of vessels to be exercised or not at their pleasure.

The following statement is made in the opinion of the Circuit Court of Appeals (Record, p. 578):

"As the result of filing the petition, all proceedings against the vessels and their owners were stayed."

It is thereupon stated in the opinion that as the result of the personal insolvency of the petitioners, it is equitable that the Farmers' Loan & Trust Company and its successor, the Oregon Railroad & Navigation Company, should be divested of all right and interest in and to the Ocklahama. Where a tort is committed in the operation of a vessel, there immediately arises a personal liability against the owners, and a maritime lien against the vessel itself. Such personal liability can be enforced in any personal action against the owners. The maritime lien against the vessel can be enforced only in a proceeding in rem. The personal liability of the owners may exceed the value of the vessel itself. It therefore follows that after the person injured has exhausted his remedy against the vessel to the extent of its value, such injured person still has a personal action against the owner for the remainder of the damages suffered. The primary and only object of a proceeding like the present is to cut off any right to recover any amount in excess of the value of the vessel itself. This limitation can be obtained by either conveying the vessel to a trustee for the benefit of the injured person, or by giving a bond representing the value of such vessel. When the vessel or her value has been placed in the hands of the court, thus giving to the injured person every benefit which might be derived from an action *in rem* against the vessel itself, it follows that not only are personal actions

against the owner stayed, but also the proceeding *in rem* against the vessel. The stay against the vessel takes effect not by reason of the form of the order staying the personal liability, but from the fact that the injured person has the full benefit of the value of the vessel as the result of her value being placed in the hands of the court.

In the present proceeding, the Oregon Railway & Navigation Company did not surrender the Ocklahama or give any bond for her value. The petition filed instituting the proceeding (Record, p. 6) did not pray that any order be granted restraining any suits against the Ocklahama, but prayed only that an order might be made restraining the prosecution of suits against the petitioners. The order of injunction (Record, p. 13) did not restrain any person whomsoever from prosecuting any maritime lien of any kind whatsoever against the Ocklahama, but only restrained the prosecution of suits and actions against the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company. In the absence of the surrender of the Ocklahama, no order could or would have been made restraining suits against the Ocklahama itself. There therefore never has been a day from the happening of the accident to the present time when any person having any maritime lien against the Ocklahama could not have undertaken to have asserted such lien by an appropriate proceeding *in rem*.

Even if an order had been made restraining suits against the Ocklahama, it would have been the duty of the respondents to have called the attention of the court to the fact that the Ocklahama had not been surrendered, and it would have followed as a matter of course that the injunction would have been modified. The real fact is that until the Oregon Short Line & Utah Northern Railway Company became insolvent, the respondents wished to realize the full amount of their claims, considerably in excess of the value of the Ocklahama, and were willing

to rely upon the solvency of the Oregon Short Line & Utah Northern Railway Company, and it was only after the Oregon Short Line & Utah Northern Railway Company became insolvent that the respondents have undertaken to twist this proceeding into one *in rem* against the Ocklahama.

The fact that the Oregon Short Line & Utah Northern Railway Company and the Oregon Railway & Navigation Company have become insolvent during the litigation does not create any equity in favor of the respondents. Such insolvency might naturally have occurred in the course of any ordinary personal litigation. Such insolvency did occur in the case of the Northern Pacific Railway Company during the prosecution of the suits terminating in the judgments in favor of the claimants in the following cases:

The Farmers' Loan & Trust Co. v. Northern Pacific R. R., 79 Fed. Rep. 227.

The Northern Pac. R. R. Co. v. Hefflin, 83 Fed. Rep. 93.

The Farmers' Loan & Trust Co. v. Longworth, 83 Fed. Rep. 336.

The Farmers' Loan & Trust Co. v. Nestelle, 79 Fed. Rep. 748.

The causes of action out of which the judgments against the Northern Pacific referred to arose are certainly as meritorious, from an equitable standpoint, as that of Balfour, Guthrie & Co., and yet in the cases just cited the Circuit Court of Appeals for the Ninth Circuit held that the mortgage upon the railroad property was superior to the equities of the judgment creditors. The only difference between the cases referred to and the present one is that as the result of the happening of the accident a maritime lien may have arisen in favor of Balfour, Guthrie & Co. against the Ocklahama; but such maritime lien has never been undertaken to be asserted in any appropriate

proceeding. Certainly no reason of an equitable nature exists whereby the Farmers' Loan & Trust Company and its successor in interest, the Oregon Railroad & Navigation Company, should be deprived of the value of the Ocklahama for the benefit of the respondents.

The courts below had power to declare that the railway companies had no right to limit their liability, but had no power to undertake to make them do so.

The question of the proper procedure discussed in this point is one which will arise in every case where the decision of the court is against the right to limit; and the only other case which we have found involving the same matter is the case referred to, decided by Judge Benedict.

In re Myers Excursion & Navigation Co., 57 Fed. Rep. 240.

The action taken therein is not in harmony with the action taken in this cause.

IV.

The Oregon Railway & Navigation Company was not liable to either of the respondents.

It is alleged in the second article of the original petition to limit liability (Record, p. 2) that the Oregon Short Line & Utah Northern Railway Company was at the time of the accident the lessee from the Oregon Railway & Navigation Company of the barge Columbia, and was at all times operating the said barge Columbia, and had the sole and exclusive possession, charge, control and management of the said barge. This article is admitted by the answer of Balfour, Guthrie & Co. (Record, p. 17), by the answer of Malvina Short (Record, p. 28), and by the answer of Sven Anderson (Record, p. 33). The fourth article of the answer of Malvina Short (Record, p. 31), alleges that Marshall B. Short, at the time of the accident, was in the employment of the Oregon Short Line & Utah Northern Railway Company. The answer of Sven Anderson (Record, p. 35) alleges that John August Peterson

was at the time of the accident in the employment of the Oregon Short Line & Utah Northern Railway Company.

Under these circumstances, it appears from the pleadings themselves that the barge Columbia and the steamer Ocklahama were solely and exclusively operated at the time of the alleged injuries by the Orgon Short Line & Utah Northern Railway Company, and that the Oregon Railway & Navigation Company had no interest of any kind whatsoever in the operation of either of the said vessels.

It was found as a fact by the district court below that the barge Columbia at the time of the accident was seaworthy, and this finding was sustained by the circuit court of appeals (Record, p. 404). Under these circumstances, the Oregon Railway & Navigation Company was not and could not be held personally liable to any extent whatsoever to either of the claimants, and the decree of the district court upon the mandate should have so found. Instead of so finding, the final decree provides (Record, p. 515) that upon the payment of the sum of $8,600 the petition for a limitation of liability of the petitioners will be allowed, and thereby implies that until said sum is paid the Oregon Railway & Navigation company is liable to the respondents.

No finding was made by the original decree of the district court to the effect that the Oregon Railway & Navigation Company was liable, save and except to the extent of its interest in the Columbia. The portion of the final decree imposing full liability, affirmed by the circuit court of appeals, is in conflict with the well-settled rule that no finding of fact can be made contrary to admissions made by the pleadings.

For the reasons stated, the decree of the circuit court of appeals should be reversed.

W. W. COTTON,
For Appellants.

A. B. BROWNE,
Of Counsel.

No. 73 and 74.

Br. of Cotton & Browne for Appt

Office Supreme Court U.S.
FILED
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IN THE

SUPREME COURT

Filed Oct. 6, 1900.

OF THE

UNITED STATES

OCTOBER TERM, ~~1899.~~ 1900

THE OREGON RAILROAD & NAVIGATION COMPANY, *Appellant*,

v.

ROBERT BALFOUR, *et. al.*, partners doing business as BALFOUR, GUTHRIE & Co., *et. al.*, *Appellees.*

THE OREGON RAILWAY & NAVIGATION COMPANY, and THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, *Appellants*,

v.

ROBERT BALFOUR, *et. al.*, partners doing business as BALFOUR, GUTHRIE & Co., *et. al.*, *Appellees.*

NOS. ~~313~~ 73 AND ~~314~~ 74

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Brief of Appellants on Motion to Dismiss the Appeal and Confirm.

W. W. COTTON,
For Appellants.

A. B. BROWNE,
Of Counsel.

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NOS. 313 AND 314.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Brief of Appellants on Motion to Dismiss the Appeal and Confirm.

The motion to dismiss the appeals is made upon the ground that this court has no jurisdiction to entertain such appeals. The argument made in the appellees' brief in support of the motion to dismiss is short and is this: A pro-

ceeding to limit liability is an "admiralty case" and therefore, under section 6 of the act establishing the circuit courts of appeals, the decrees of such courts are final.

The material portions of the 6th section of the act referred to are as follows: "The judgments or decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, the revenue law and under the criminal laws and in admiralty cases. . . . In all cases not hereinbefore in this section made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed $1,000 besides costs."

If a proceeding to limit liability be not an "admiralty case" it is clear that under this statute the appellants have as a matter of right an appeal to this court. A proceeding to limit liability is not an "admiralty case" in any sense of the term. In support of this position the following matters are now suggested and will be hereafter discussed:

First—A proceeding to limit liability is a proceeding created and existing wholly by virtue of statute and is a proceeding never known to courts of admiralty.

Second—A proceeding to limit liability is an equitable proceeding and involves the appointment of a trustee and the granting of injunctions, both preliminary and final; but the district court as a court of admiralty has no equitable powers and exercises no equitable jurisdiction, although the subject be maritime.

Third—Congress had power to create the proceeding to limit liability not because the judicial power of the United States extends to cases of admiralty jurisdiction but because such judicial power extends to cases of maritime jurisdiction. The district courts have jurisdiction over such

proceedings not because such district courts are courts of admiralty but because such courts have jurisdiction over "all causes of maritime jurisdiction."

Fourth—The constitution, in granting judicial power, conferred such power in "cases of admiralty and maritime jurisdiction." By the judiciary act establishing the district courts jurisdiction of such courts extends to all "causes of admiralty and maritime jurisdiction." The rules of this court regulating the exercise of such jurisdiction are "rules of practice for the courts of the United States in admiralty and maritime jurisdiction." The use of both words admiralty and maritime is not mere redundancy, and a meaning must necessarily be attached to both words. In view of the use of both words in the constitution and in the act conferring jurisdiction upon the district court, congress must be presumed by the act of 1891 establishing the circuit courts of appeal to have drawn a distinction between admiralty cases and maritime cases, and a proceeding to limit liability clearly belongs to the latter class.

In support of the assertion that proceedings to limit liability are "admiralty cases" reference is made in the brief of the appellees to several opinions of this court. In all of the cases to which reference is made questions were presented as to the jurisdiction of the district courts over proceedings to limit liability; but no question similar to the one involved in this case was considered or decided. The only possible support which these cases give to the proposition asserted by the appellees is that in the general discussion contained in some of them the words "admiralty courts" or "admiralty jurisdiction" may be found. The history of the act limiting the liability of shipowners appearing in the very cases to which reference is made in the brief of the appellees shows that the expressions quoted were not used in a technical sense but in a general sense and without regard to their exact meaning. A reading of the cases decided by

this court under the limited liability act shows that with at least equal frequency and with much more exactness the rule of limited liability is referred to as a rule of the "maritime" law to be applied in "maritime cases" in the exercise of the "maritime jurisdiction" of the courts. Indeed, the very quotations contained in the brief for the appellees show that the word "maritime" is more frequently used in reference to the rule to the proceedings and to the jurisdiction than is the word "admiralty."

Our view of the proceeding might be supported by numerous quotations from the decisions of this court similar to the following, found in The Scotland, 105 U. S. 31, and quoted in Butler v. Boston Steamship Co., 130 U. S. 556.

"It is enough to say, that the rule of limited responsibility is now our maritime rule. It is the rule by which, through the act of congress, we have announced that we propose to administer justice in maritime cases."

We refrain from making such quotations, for the reason that we feel that the right of appeal in this case should not depend upon mere words used by this court in describing the proceeding, but should and will rest upon broader and higher grounds.

The material portions of the act limiting the liability of shipowners are found in the Revised Statutes, sections 4283, 4284 and 4285. The first section states the rule in broad and general terms that the liability of the owner of any vessel for any act, matter or thing done, occasioned or incurred without the privity or knowledge of such owner shall in no case exceed the amount of the value of the interest of such owner in such vessel and her freight then pending. The other sections provide in substance that the owners of the vessel, or any of them, may take appropriate proceedings in any court for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto; that it shall be deemed

a sufficient compliance on the part of such owner with the requirements of the act if he shall transfer his interest in such vessel and freight to a trustee to be appointed by any court of competent jurisdiction to act as such trustee for the person who may prove legally entitled thereto; and that from and after such procedure all claims and proceedings against the owner shall cease. This act does two things, namely, first, it establishes a rule limiting the liability of shipowners; and, second, it provides a proceeding which the owner may initiate for the purpose of having a course of all claimants and of limiting once and for all the owner's liability to the value of the vessel.

A distinction is to be noted at the outset between the rule establishing the limitation and the proceeding to be taken by the owner for the purpose of obtaining such a limitation against all persons. The rule limiting the liability of shipowners is applicable to all courts, both state and federal; and the right to the limitation may be set up by the owner as a defense in any form of action in any court.

In the Manitoba, 122 U. S. 97, the limitation was claimed in an answer to a libel in rem against the vessel.

In The Scotland, 105 U. S. 24, the limitation was claimed in an answer to a libel in personam against the owner of the vessel.

In Craig v. Continental Ins. Co., 141 U. S. 638, the limitation was obtained in an answer filed in an action at law.

The proceeding to be instituted by the owner for the purpose of obtaining a general limitation of liability stands by itself as one distinct from any other proceeding known to any court of law, of equity or of admiralty.

During the course of the proceeding, the district court appoints a trustee whose acts it must control and govern. When the proceeding is commenced, the petitioner may apply for and obtain an injunction against the prosecution of all actions against him (Rule 54), and if the owner be

entitled to the limitation, the final result is a decree enjoining all suits against the owner. All of these functions are those of a court having a special jurisdiction but exercising powers peculiar to a court of equity. A court of admiralty as such never exercised any such powers and never performed any such functions. This court has repeatedly said that a court of admiralty has not the characteristic powers of a court of equity. Upon this subject Mr. Justice Fuller says:

"While the court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity. It cannot entertain a bill or libel for specific performance, or to correct a mistake, *Andrews v. Essex. Ins. Co.*, 3 Mason, 6, 16; or declare or enforce a trust or an equitable title, *Ward v. Thompson*, 22 How. 330; *The Amelia*, 6 Ben. 475; *Kellum v. Emerson*, 2 Curtis, 79; or exercise jurisdiction in matters of account merely, *Grant v. Poillon*, 20 How. 162; *Minturn v. Maynard*, 17 How. 477; *The Ocean Belle*, 6 Ben. 253; or decree the sale of a ship for an unpaid mortgage, or declare her to be the property of the mortgagees and direct possession of her to be given to them. *Bogart v. The John Jay*, 17 How. 399."

The Eclipse, 135 U. S. 599, 608.

The nature of the proceeding is such that the circuit court of appeals for the ninth circuit in this very proceeding (Record, p. 578) stated that the proceeding is "a suit in equity in admiralty." It would seem that one might with equal exactness speak about a suit in equity at law, or an action at law in equity, or a case in admiralty in equity.

This court has truly said that where a vessel is not surrendered to a trustee the proceeding to limit liability "*is an equitable action.*"

In re Morrison, 147 U. S. 34.

Such an equitable action, existing solely by virtue of statute, although within the jurisdiction of the district court is in no sense of the term "an admiralty case"; and the history of the law limiting the liability of shipowners shows that the district court has jurisdiction of the proceeding not as a case of admiralty jurisdiction but as a case of maritime jurisdiction.

"Actions at law," "suits in equity," "cases of admiralty jurisdiction," and "cases of maritime jurisdiction" are words which have been repeatedly used in the statutes of the United States; and such words have a definite and precise meaning. The very grant of judicial power contained in the constitution is in the following words:

"The judicial power shall extend to all cases of admiralty and maritime jurisdiction."

Constitution, Sec. II, article 3.

The district courts are given jurisdiction of all causes of admiralty and maritime jurisdiction.

The judiciary act of 1789, 1 Stats. at Large, 176.

The rules of practice established by this court for the guidance of the courts of the United States in the exercise of the constitutional jurisdiction are "rules of practice for the courts of the United States in admiralty and maritime jurisdiction."

The words "admiralty" and "maritime" have not the same meaning and should not on familiar principles be so construed.

To each of the words of the constitution is to be given its own meaning. Mr. Benedict well says:

"Its grants of judicial power, as well as of political sovereignty, are brief, sententious and comprehensive. None of its words are to be disregarded, as without meaning, nor to be considered as used to round a period, or to give fullness and euphony to a sentence. Its phraseology was most carefully chosen, and all its words are significant,

and introduced for the purpose of conveying their appropriate shades of meaning."

Benedict's Admiralty, 3d Ed., Sec. 21.

If several words are used which may or may not bear the same meaning, each word is to be held to be used in different senses, as otherwise it would appear that there had been a simple redundancy of language to express the same idea, and this redundancy is not to be presumed.

In Arthur v. Morgan, 112 U. S. 500, it was held that where words susceptible of the same meaning are used in connection with each other in the same statute, it must be held that by the use of the words a separate and distinct meaning was intended to be attached to each. In that case the court had occasion to construe a statute containing in one place the clause "household effects" and in another the clause "personal and household effects." In disposing of this question the court stated the following principle: "Clause 2 above uses the words 'personal and household effects.' This serves to show that, by the use of the words 'household effects' alone, in clause 1, in the same section of the statute, something is intended different from 'personal effects,' and that those words embrace articles which the words 'personal effects' do not cover."

In Anderson v. Fitzgerald, 24 Eng. Law & Eq. 1, it was said by Lord St. Leonards, page 14: "Now, when I find that the contract uses two words, which may have the same meaning, but which are open to different senses, to express the same thing, I must be very well satisfied, before I apply the same construction to those two words, that such was the intention; for if a proper word is used which admits of a different sense, although it may admit of the same sense, I should come naturally to the conclusion, if there is nothing in the context to prevent it, that the intention was not to use the second word in the same sense in which

the first word was used, or else why not repeat the first word?"

The words "admiralty" and "maritime" were used in the constitution in different senses; and by the use of the word "maritime" the judicial power of the United States and of the courts established by it is extended far beyond "the most ambitious pretensions of the English admiralty at any period of its existence." In two opinions delivered by justices of this court the words "admiralty" and "maritime" have been examined in connection with the jurisdiction of the district courts. One of these is the dissenting opinion of Mr. Justice Daniel in the case of the New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 6 How. 378, 405, and the other is the opinion of Mr. Justice Story, in De Lovio v. Boit, 2 Gallison, 398, 471. The first of these opinions was delivered in an attempt to exclude from the jurisdiction of the district courts contracts made on land but to be executed upon the water. The second opinion extended the jurisdiction of the district courts over all maritime cases. The first of these opinions is important and interesting only for the purpose of showing the controversy in this court over the jurisdiction of the district court; but the second is stated by Mr. Abbott in a note to the case in Meyer's Federal Decisions, Vol. 23, p. 20, as having at the time when he wrote been cited more frequently than even the famous Dartmouth College case. In the first opinion, referring to the opinion of Mr. Justice Story in De Lovio v. Boit, Mr. Justice Daniel uses the following language (6 How. 405):

"The still greater danger of theorizing upon words not of precise or definite import, freed from the restraints of settled acceptation, has been exemplified in our own time and country, in an able, learned and ingenious effort to confer on the admiralty here powers not merely coextensive with the most ambitious pretensions of the English

admiralty at any period of its existence, but powers that may be derived from the laws and institutions of almost every community of ancient or modern Europe, and covering not only seas and navigable waters, but men and their transactions having no necessary connection with waters of any description, namely, shipwrights, material men and insurers (vide 2 Gall. 397); and this upon the assumption that the term maritime implied more than the word admiralty, when unassociated with it, and that this was so understood by the framers of the constitution, who designed it as an enlargement of the admiralty power. Yet if we turn to the language of Mr. Justice Blackstone, Vol. 3, p. 106, he tells us that the courts maritime are the admiralty courts, using the terms maritime and admiralty as convertible; and that the injuries triable in the admiralty (or maritime causes) are such as are of common-law cognizance, yet, being committed on the high seas, are therefore to be tried by a peculiar court. Again, p. 68, he says: 'The maritime courts, or such as have power and jurisdiction to determine all maritime injuries arising upon the seas, or in parts out of the reach of the common law, are only the court of admiralty and its court of appeal.' So, likewise, Sir Matthew Hale, p. 50, in characterizing maritime contracts to be those made and to be executed upon the sea, certainly excludes any implication beyond these; and this must be taken as the English interpretation of the term maritime, by which it is understood as identical with admiralty."

In the second case, 2 Gall. 471, Mr. Justice Story says: "The clause, however, of the constitution not only confers ***admiralty*** jurisdiction, but the word 'maritime' is superadded, seemingly ***ex industria***, to remove every latent doubt. 'Cases of maritime jurisdiction' must include all maritime contracts, torts and injuries, which are in the understanding of the common law, as well as of the admi-

ralty, '*causae civiles et maritimae*.' In this view there is a peculiar propriety in the incorporation of the term 'maritime' into the constitution. The disputes and discussions, respecting what the admiralty jurisdiction was, could not but be well known to the framers of that instrument. One party sought to limit it by locality; another by the subject matter. It was wise, therefore, to dissipate all question by giving cognizance of all 'cases of maritime jurisdiction,' or, what is precisely equivalent, of all maritime cases. Upon any other construction, the word 'maritime' would be mere tautology; but in this sense it has a peculiar and appropriate force. Justice Winchester (speaking with reference to contracts) has very correctly observed that 'neither the judicial act nor the constitution, which it follows, limit the admiralty jurisdiction of the district court in any respect to place. It is bounded only by the *nature of the cause* over which it is to decide.'

"The language of the constitution will therefore warrant the most liberal interpretation; and it may not be unfit to hold that it had reference to that maritime jurisdiction, which commercial convenience, public policy and national rights have contributed to establish, with slight local differences, over all Europe; that jurisdiction which, under the name of consular courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction, in short which, collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable *Consolato del Mare*, and still continues in its decisions to regulate the commerce, the intercourse, and the warfare of mankind."

Note in connection with this quotation that Mr. Justice Story applies the rule of construction to which reference has been made, namely, that both "admiralty" and "mari-

time" should be given a meaning, but not the same meaning; and note further, the definition attached by Mr. Justice Story to the words "maritime jurisdiction." This definition is important and directly applicable to the act to limit the liability of shipowners, as will be shown in connection with the discussion of the history of that act. It is needless to refer to decisions of this court for the purpose of showing that the able and learned and ingenious effort referred to by Mr. Justice Daniel to confer "on the admiralty here powers not merely coextensive with the most ambitious pretensions of the English admiralty at any period of its existence, but powers that may be derived from the laws and institutions of almost every community of ancient and modern Europe, and covering not only seas and navigable waters, but men and their transactions having no necessary connection with waters of any description; namely, shipwrights, material men and insurers," has succeeded; and a critical examination of the decisions shows that such result could only have been reached "upon the assumption that the term maritime implied more than the word admiralty, when unassociated with it, and that this was so understood by the framers of the constitution, who designed it as an enlargement of the admiralty power."

The words "cases of admiralty jurisdiction" had a meaning at the time of the adoption of the constitution, and they have that meaning yet, and can have no other meaning.

The admiralty and maritime jurisdiction of the United States is to be determined as of the date of the constitution. Upon this subject, Mr. Justice Catron says:

"The question presented involves a contest between the state and federal governments. The latter has no power or jurisdiction beyond what the constitution confers; and among these it is declared that the judicial power shall extend 'to all cases of admiralty and maritime juris-

diction'; and by the judiciary act of 1789, this jurisdiction is conferred on the district courts of the United States. The extent of power withdrawn from the states and vested in the general government, depends on a proper construction of the constitutional provision above cited. Its terms are indefinite, and its true limits can only be ascertained by reference to what cases were cognizable in the maritime courts when the constitution was formed—for what was meant by it then, it must mean now; what was reserved to the states to be regulated by their own institutions cannot be rightfully infringed by the general government, either through its legislative or judiciary department. The contest here is not so much between rival tribunals as between distinct sovereignties, claiming to exercise power over contracts, property and personal franchises."

Ferry Company v. Beers, 20 Howard, 401.

As a result of the foregoing principle, the judicial power of the United States cannot be enlarged by any act of congress or by any rule of this court. Upon this subject, Mr. Justice Bradley, in The Lottawanna, 21 Wall. 558, 575, says:

"The question is discussed with great felicity and judgment by Chief Justice Taney, delivering the opinion of the court in the case of ***The St. Lawrence***, where he says: 'Judicial power, in all cases of admiralty and maritime jurisdiction, is delegated by the constitution to the federal government in general terms, and courts of this character had then been established in all commercial and maritime nations, differing, however, materially in different countries in the powers and duties confided to them; the extent of the jurisdiction conferred depending very much upon the character of the government in which they were created, and this circumstance, with the general terms of the grant, rendered it difficult to define the exact limits of its power in the United States. This difficulty was in-

creased by the complex character of our government, where separate and distinct specified powers of sovereignty are exercised by the United States and a state independently of each other within the same territorial limits. And the reports of the decisions of the court will show that the subject has often been before it, and carefully considered, without being able to fix with precision its definite boundaries; but certainly no state law can enlarge it, nor can an act of congress or rule of court make it broader than the judicial power may determine to be its true limits. And this boundary is to be ascertained by a reasonable and just construction of the words used in the constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the federal government."

It follows from these decisions that if a proceeding to limit liability was not within the judicial power of the United States at the time of the adoption of the constitution, such judicial power could not be extended to any such proceeding by any subsequent act of congress or by any rule of this court. An examination of the earlier decisions of this court indicates clearly and positively that the words "admiralty jurisdiction" in the constitution would never have extended the judicial power of the United States to a proceeding to limit liability.

For years a controversy waged in this court as to whether the grant of judicial power in "cases of admiralty and maritime jurisdiction" was limited to those cases over which the admiralty courts of England exercised jurisdiction when the constitution was adopted, or whether it extended to the cases over which the admiralty court of England originally had jurisdiction and over which the admiralty courts of the states exercised jurisdiction at the time the constitution was adopted. In view of this controversy, can it truly be said that the words "cases of

admiralty jurisdiction" when used alone would have extended the judicial power of the courts of the United States to cases, subjects and reliefs unknown to the admiralty court of England in the exercise of their broadest jurisdiction and unknown to any of the state courts at the time of the adoption of the constitution?

Mr. Justice Clifford in 1887 sums up all of the cases decided during the controversy as to the limits of the constitutional jurisdiction in the following words:

"In order, therefore, to determine the limits of the admiralty jurisdiction, it becomes necessary to ascertain the true interpretation of the constitutional grant. On that subject three propositions may be assumed as settled by authority, and to those it will be sufficient to refer on the present occasion, without much discussion of the principles on which the adjudications rest:

1. That the jurisdiction of the district courts is not limited to the particular subjects over which the admiralty courts of the parent country exercised jurisdiction when our constitution was adopted.

2. That the jurisdiction of those courts does not extend to all cases which would fall within such jurisdiction, according to the civil law, and the practice and usages of continental Europe.

3. That the nature and extent of the admiralty jurisdiction conferred by the constitution must be determined by the laws of congress and the decisions of this court, and by the usages prevailing in the courts of the states at the time the federal constitution was adopted. No other rules are known which it is reasonable to suppose could have been in the minds of the framers of the constitution than those which were then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts.

Ex Parte Easton, 95 U. S. 70.

This careful statement of the extent of the admiralty jurisdiction would exclude from such jurisdiction proceedings to limit liability. The history of the limitation of the liability of shipowners shows that the rule was not the rule of the civil law or of the law of Oleron, or of any of the ancient codes at any time followed by the courts of admiralty in England, and was not in force in any of the states at the time of the adoption of the constitution. If the rule limiting liability was unknown to English courts of admiralty in the exercise of their widest jurisdiction and was unknown in the state courts at the time of the constitution, then the framers of the constitution were never accustomed to see any such rule or any such proceeding in daily and familiar practice in their state courts. If the rule was unknown, certainly the equitable proceeding, purely the creature of statute, was unknown to and beyond the jurisdiction of the admiralty courts, referred to by the framers of the constitution. The words "cases of admiralty jurisdiction" found in the constitution did not and can not include a proceeding created by statute in 1851 and affording equitable relief never before known to an admiralty court. It takes a broader word than "admiralty" to bring this proceeding within the jurisdiction of the district court; and such broader word is found in "maritime," as defined by Mr. Justice Story, in De Lovio v. Boit, 2 Gall. 471.

In the first case decided in this court in connection with the act limiting the liability of shipowners, Mr. Justice Bradley gives a history of the rule, and in a subsequent case again states its history.

Norwich Co. v. Wright, 13 Wall. 104, 116.

The Scotland, 105 U. S. 24, 28.

The facts stated in these cases show that while the limited liability of shipowners was a rule of the modern maritime law of Europe, it was not adopted by the civil law or by any of the ancient maritime codes constituting the

foundation of the English admiralty law, and that the rule owes its existence in this country and England solely by virtue of statute. Upon these subjects Mr. Justice Bradley says:

"But whilst this is the rule of the general maritime law of Europe, it was not received as law in England nor in this country until made so by statute."

The Scotland, 105 U. S. 28.

"But whilst the rule adopted by congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the statute and not upon any inherent force of the maritime law. . . . Therefore, whilst it is now a part of our maritime law, it is, nevertheless, statute law and must be interpreted and administered as such."

The Scotland, 105 U. S. 29.

"The history of the limitation of liability of shipowners is a matter of common knowledge. . The learned opinion of Judge Ware in the case of The Rebecca, leaves little to be desired on the subject. He shows that it originated in the maritime law of modern Europe; that whilst the civil, as well as the common, law made the owner responsible to the whole extent of damage caused by the wrongful act or negligence of the master or crew, the maritime law only made them liable (if personally free from blame) to the amount of their interest in the ship. So that, if they surrendered the ship they were discharged."

Norwich Company v. Wright, 13 Wall. 116.

The opinion of Judge Ware in The Rebecca, 1 Ware, 187, 194, shows, as stated by Mr. Justice Bradley, that the limitation of liability originated in a maritime law of modern Europe, was contrary to the Roman law, and was unknown to the laws of Oleron and every other system of jurisprudence applied by the English admiralty courts; but was a rule applied by the consular courts along the Mediterranean and first stated in the Consulate of the

Sea. Note some quotations from the opinion of Judge Ware:

"The principle of the limitation of the responsibility of the owners for the acts of the master, together with the cognate rule by which the ship is tacitly hypothecated for the obligations contracted by him, when acting in the quality of master, and within the scope of his authority as such, is entirely due to modern invention. No trace of it is to be found in the Digest of the Roman law, nor in the maritime legislation of the Eastern Empire, nor in the compilation which goes under the name of the Rhodian Law, a work which, though not entitled to the name which it has received, is undoubtedly a work of high antiquity, and of an earlier date than any of the maritime codes of Western Europe. It originated in the maritime usages of the middle ages, and more particularly in the Mediterranean, where commerce first acquired activity and extension after the fall of the Western Empire. In Italy and the southern ports of France and Spain the custom seems to have been nearly coeval with the revival of maritime commerce. That it had its origin in the Mediterranean, and probably in Italy, the cradle of the modern law merchant, appears from the fact that no traces of it are to be found in the ***Laws of Oleron***, a code earlier than the Consulate, at least in the form in which we now have it, and which constitutes the basis of the maritime law of the western parts of Europe; nor is there any indication of it in any of the earlier codes which were derived from this primitive compilation. It was at a later period that it extended to the western and northern ports of the continent." (Page 200.)

"That this was the settled law of the Mediterranean is abundantly proved by several chapters in the Consulate of the Sea, which governed the maritime commerce of all the ports of that sea" (Page 195.)

Speaking of the contract of ***Commande*** to which the origin of the custom is attempted to be traced, and to which Judge Ware states (p. 202) the Consulate devotes eleven chapters, Judge Ware states (p. 202):

"This contract being found to be so well adapted to the wants of society and to the hazards of commerce at the time, was not long in extending itself over the Continent of Europe. It seems, however, never to have reached England, or at least never was adopted there as a general commercial custom. The British Islands have always been, to a considerable extent, isolated from the rest of Europe in their customs and modes of thinking, as well as in their geographical position."

A reading of the entire opinion of Judge Ware in The Rebecca, ***supra***, shows that the rule limiting the liability of shipowners was not a rule of any court but was a general rule of maritime law applicable to all courts exercising jurisdiction in the states which had adopted it. As stated on pages 196, 197, "it became at once the universal law of maritime nations." The rule, therefore, is a rule of maritime law and never was a rule of the courts of admiralty, known to the framers of the constitution. A proceeding to limit liability is therefore cognizable in a district court, not because the proceeding is an admiralty case, but because it is a maritime case. In this connection note the quotation already made from the opinion of Mr. Justice Story in De Lovio v. Boit, 2 Gall. 471, defining "cases of maritime jurisdiction."

In connection with this definition the following quotation from the opinion of Mr. Justice Bradley in Butler v Boston Steamship Co., 130 U. S. 555, is interesting and instructive: (The italics are ours.)

"The law of limited liability, as we have frequently had occasion to assert, was enacted by congress as a part of the ***maritime*** law of this country, and therefore it is coex-

tensive, in its operation, with the whole territorial domain of that law. *Norwich Co. v. Wright*, 13 Wall. 104, 127; *The Lottawana*, 21 Wall. 558, 577; *The Scotland*, 105 U. S., 24, 29, 31; *Providence & New York Steamship Co. v. Hill Manfg. Co.*, 109 U. S. 578, 593. In *The Lottawana* we said: 'It cannot be supposed that the framers of the constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed.' (P. 577.) Again, on page 575, speaking of the *maritime* jurisdiction referred to in the constitution, and the system of law to be administered thereby, it was said: 'The constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of *maritime* law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.' In *The Scotland* this language was used: 'But it is enough to say that the rule of limited responsibility is now our *maritime* rule. It is the rule by which, through the act of congress, we have announced that we propose to administer justice in *maritime cases*.' (P. 31.) Again, in the same case, p. 29, we said: 'But, whilst the rule adopted by congress is the same as the rule of the general *maritime law*, its efficacy as a rule depends upon the statute, and not upon any inherent force of the *maritime* law. As explained in *The Lottawana*, . . . the *maritime* law is only so far operative as law in any country as it is adopted by the laws and usages of that country; and this particular rule of the *maritime* law had never been adopted in this country until it was enacted by statute. Therefore,

whilst it is now a part of our *maritime* law, it is, nevertheless, *statute law*.' And in *Providence & New York Steamship Co. v. Hill Mntg. Co.*, it was said: 'The rule of limited liability prescribed by the act of 1851 is nothing more than the old *maritime* rule, administered in courts of admiralty in all countries except England, from time immemorial; *and if this were not so, the subject matter itself is one that belongs to the department of maritime law*.' (P. 593.)"

If the rule to limit liability is a rule of the maritime law to be administered in maritime cases, and exists wholly in this country as the result of statute, and was not a rule applied by any of the admiralty courts known to the framers of the constitution, then the statutory proceeding to limit in which the district court exercises the powers of a court of equity, as distinguished from those of a court of admiralty, cannot be termed an "admiralty case," but is a "maritime case" over which the district court, as a court of general maritime jurisdiction and powers, has cognizance.

Note some further facts showing the nature of the proceeding:

After the rule was adopted by statute in England, full limitation was obtained by bill in equity.

Norwich Co. v. Wright, 13 Wall. 118.

Massachusetts in 1818, and Maine in 1821, adopted the rule; but, under their practice, general limitation was obtained by a bill in equity.

Norwich Co. v. Wright, 13 Wall. 119.

Congress might have invested the circuit courts of the United States with jurisdiction of such cases by bill in equity. Congress not having so acted, this court held that the district courts as courts of admiralty and maritime jurisdiction, had jurisdiction over the matter. The rules of the district courts as courts of admiralty had no

application to such a proceeding, and therefore this court felt called upon in the exercise of an undoubted power to make the needful rules and regulations for facilitating the course of proceeding. This statement is clearly made by Mr. Justice Bradley, in Norwich Co. v. Wright, 13 Wall 123:

"Congress might have invested the circuit courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the state courts have not the requisite jurisdiction. Unless, therefore, the district courts themselves can administer the law, we are reduced to the dilemma of inferring that the legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the district courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter, and this court undoubtedly has the power to make all needful rules and regulations for facilitating the course of proceeding."

The district court, sitting as a court of admiralty, does not recognize or apply the rule in an admiralty case save and except when it is set up as a matter of defense. Even in a suit in rem, to which every creditor of the ship is a party, the district court, as a court of admiralty, does not and cannot grant the owner general limitation of liability; but such owner, in order to obtain the limitation, must commence the special proceeding prescribed by the rules of this court.

Norwich Co. v. Wright, 13 Wall. 104, 128.

When this proceeding is commenced, the jurisdiction which is exercised is not the jurisdiction of a court of admiralty, but of a court of equity, and the case is not an admiralty case, but an equitable action.

In re Morrison, 147 U. S. 34.

The constitution extends the grant of judicial power to "all causes of maritime and admiralty jurisdiction," and by the judiciary act the district courts are given jurisdiction of all "causes of admiralty and maritime jurisdiction." These words had their meaning and were used advisedly; and if congress had intended to cut off appeals to this court from the circuit courts of appeals in all cases of admiralty and maritime jurisdiction, it would have been easy to have used the familiar words found in the constitution and in the judiciary act. Not having used these words and limiting appeals only in "admiralty cases" and conferring the right of appeal in all other cases, it should have presumed that this proceeding of a purely equitable character not cognizable by the district court as a court merely of admiralty was one of the class of cases in which an appeal exists as a matter of right to this court. The appeal taken in this case was taken after due consideration. We feel that jurisdiction over it should be exercised by this court; and we hope that this argument, necessarily hastily prepared, will at least satisfy the court that we need not feel ashamed because this appeal was taken, notwithstanding that no right of appeal to this court exists in "an admiralty case."

W. W. COTTON,
For Appellants.

A. B. BROWNE,
Of Counsel.